

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

DOMINIC FAGUNDES,

No. 3:12-cv-01202-HU

Plaintiff,

**OPINION AND
ORDER**

v.

DR. CHRIS DIGIULIO, and
MS. CAZIER,

Defendants.¹

Dominic Fagundes
45500 Hebo Rd.
P.O. Box 68
Grand Ronde, OR 97347

Pro Se Plaintiff

Robert E. Sullivan
Oregon Department of Justice
Trial Division
1162 Court Street NE
Salem, OR 97301-4096

Attorney for Defendants

¹ The Clerk of Court is directed to correct, on this Court's docket, the spelling of Dominic Fagundes's name and Chris Digiulio's name, as reflected in this Opinion and Order.

1 HUBEL, Magistrate Judge:

2 Plaintiff Dominic Fagundes ("Plaintiff") brings this 42 U.S.C.
3 § 1983 action against Defendants Chris Digiulio ("Digiulio") and
4 Ellen Cazier ("Cazier") (collectively, "Defendants"), a physician
5 and nurse at Deer Ridge Correctional Institution ("DRCI"),
6 respectively, alleging an Eighth Amendment claim based on
7 inadequate prison medical treatment. Specifically, Plaintiff
8 claims that Defendants exhibited deliberate indifference to his
9 serious medical needs by confiscating his wheelchair. As explained
10 further below, Plaintiff has not presented evidence that raises a
11 genuine issue of fact suggesting Defendants' response to
12 Plaintiff's medical needs was deliberately indifferent.
13 Accordingly, Defendants' motion (Docket No. 49) for summary
14 judgment is granted and this action is dismissed with prejudice.

15 **I. FACTS AND PROCEDURAL HISTORY**

16 In December 2008, Plaintiff was involved in a motor vehicle
17 accident and sustained numerous injuries, including fractures of
18 both legs and his pelvis necessitating open reduction and internal
19 fixation ("ORIF") surgery. (Digiulio Decl. Attach. 2 at 4-5, 92,
20 94-95, 248.) Over a year and a half later, on July 14, 2010,
21 Plaintiff was transferred to the Coffee Creek Correctional Facility
22 ("CCCCF") from the Polk County Jail, where had he been imprisoned
23 since April 2010. (Digiulio Decl. ¶ 3, Attach. 2 at 382.) "A
24 cautionary note on [Plaintiff]'s problem list upon transfer from
25 county jail to the [CCCCF] Intake Center indicate[d] he received
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1 methadone while at [the] county jail and [that he] is prone to seek
2 more and more methadone.”² (Digiulio Decl. ¶ 7, Attach. 2 at 1.)

3 Immediately upon his arrival at the CCCF on July 14, 2010,
4 Plaintiff reported mobility issues, chronic pain and an inguinal
5 hernia, and his treating physician “ordered restrictions of low
6 bunk, no stairs, and the use of a wheelchair for one year.”
7 (Digiulio Decl. ¶¶ 6-7, Attach. 2 at 50.) About two months later,
8 on September 3, 2010, Plaintiff was transferred to DRCI in Madras,
9 Oregon. (Digiulio Decl. ¶ 3.) Plaintiff submitted an inmate
10 communication form that same day, stating: “I have . . . approval
11 for [the] Shutter Creek [Alternative Incarceration Program or] AIP
12 [p]roviding I get your approval as its [sic] not wheelchair
13 friendly, [and] I can walk on a cane.” (Digiulio Decl. Attach. 2
14 at 382.) The medical department at DRCI received Plaintiff’s
15 inmate communication form or “kyte” on or before September 7, 2010,
16 when it made a note in Plaintiff’s medical file. (Digiulio Decl.
17 Attach. 2 at 10.)

18 The next day, on September 8, 2010, the chief medical officer
19 at DRCI, Digiulio, examined Plaintiff based on reports of chronic
20 pain. (Digiulio Decl. ¶¶ 1, 9.) According to Digiulio, the

21 examination revealed that [Plaintiff’s] vital signs were
22 stable, his lower back contained a surgical scar in a
23 vertical fashion over the lumber region and he had a
24 horseshoe-shaped scar over his left hip. There were a few
25 scars along his left lower extremity. He had muscle
26 atrophy in the left lower calf and scarring over the
27 anterior surface of the shin. The quadriceps musculature
28 and hamstring were intact. The left leg full range of
motion was asymmetrical compared to the right side hip
and knee and was neurovascularly intact.

² The medical records reveal that Plaintiff also has a history
of heroin addiction. (Digiulio Decl. Attach. 2 at 30.)

1 (Digiulio Decl. ¶ 10.) Digiulio's "assessment was that [Plaintiff]
2 was given morphine and Vicodin at the CCCF Intake Center with very
3 little in terms of objective findings or history documentation,"
4 and "his pain management regimen between the time of his accident
5 in 2008 and his incarceration [wa]s sketchy at best." (Digiulio
6 Decl. ¶¶ 11-12, Attach. 2 at 10.) Digiulio thus "recommended a
7 plan of care to discontinue the wheelchair [in order to improve
8 Plaintiff's mobility by walking and using a cane], continue
9 [Plaintiff] on Naprosyn, increase Elavil to 75 m[illigrams] and
10 obtain old [medical] records."³ (Digiulio Decl. ¶¶ 12, 14.)

11 Digiulio also discussed the need to discontinue the use of a
12 wheelchair with Plaintiff during their September 8, 2010
13 consultation, and Digiulio's treatment notes include a reference to
14 "DC wheelchair." (Digiulio Decl. ¶ 14, Attach. 2 at 10; Cazier
15 Decl. ¶¶ 7, 11.) Digiulio, however, concedes that he did not write
16 "an order discontinuing the wheelchair" until October 13, 2010.
17 (Digiulio Decl. ¶ 15, Attach. 2 at 52.) At that time, Plaintiff
18 "was able to walk with the aid of a cane [which was already in his
19 possession] and [he] had left the wheelchair unattended on two or
20 more occasions creating a security concern." (Digiulio ¶ 15,
21 Attach. 2 at 12-13; see also Cazier Decl. ¶¶ 8-9.) Cazier
22 confiscated Plaintiff's wheelchair on the same day Digiulio issued
23 his written order, and two days later, on October 15, 2010,
24 Digiulio wrote "an order authorizing the use of a cane for three
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26
27 ³ An ODOC technician was ultimately unable to obtain pre-
28 incarceration medical records regarding Plaintiff's pain management
based on the information provided by Plaintiff. (Digiulio Decl.
Attach. 2 at 275-76, 371-72, 375.)

1 months."⁴ (Digiulio Decl. ¶ 16, Attach. 2 at 12, 369; Cazier Decl.
2 ¶¶ 13-14.)

3 On October 25, 2010, Plaintiff "was seen by nursing staff for
4 medication and requested his wheelchair be returned. He was
5 instructed to sign up for sick call but did not follow up with this
6 request." (Digiulio Decl. ¶ 17, Attach. 2 at 13.) A little over
7 a month later, on December 4, 2010, Plaintiff informed a registered
8 nurse at DRCI that he "want[ed] clearance to do stairs [because he]
9 want[ed] to go to [Shutter Creek] AIP." (Digiulio Decl. Attach. 2
10 at 14.) Then on December 29, 2010, Cazier sent Plaintiff an inmate
11 communication response explaining that his stair restriction
12 expired in October and that "[t]he only notations on [his] Health
13 Statute [we]re for lower bunk and a cane." (Digiulio Decl. Attach.
14 2 at 367.)

15 On February 2, 2011, Plaintiff followed up with the medical
16 staff regarding his inguinal hernia. (Digiulio Decl. Attach. 2 at
17 14.) That same day, Cazier sent Plaintiff an inmate communication
18 response stating: "[Y]our low-bunk status and use of the cane ha[d]
19 be[en] re-ordered for [one] year. You will also be scheduled for
20 a follow-up appointment with the [d]octor regarding your hernia."⁵
21 (Digiulio Decl. Attach. 2 at 363.) Six days later, on February 8,
22

23 ⁴ As discussed *infra* Part III, portions of Cazier's
24 declaration not cited by the Court in this background section
25 include typographical errors regarding the date of confiscation.
26 Nonetheless, Plaintiff's amended complaint and other record
evidence reveal that his wheelchair was indeed confiscated in mid-

27 ⁵ Plaintiff ended up using a cane throughout the remainder of
28 his period of incarceration at DRCI, which ended on November 19,
2013.

1 2011, Digiulio wrote an order authorizing Plaintiff to perform
2 "light duty work for one year with no lifting over twenty pounds
3 and no hurrying required." (Digiulio Decl. ¶ 20.)

4 Nearly two months later, on March 30, 2011, Plaintiff was seen
5 by Rodney Buzzas ("Buzzas"), M.D., regarding his hernia and elected
6 to have it surgically repaired. (Digiulio Decl. Attach. 2 at 231,
7 235.) Notably, Plaintiff denied any painful or stiff joints,
8 muscle cramps, or back pain during his consultation with Buzzas.
9 (Digiulio Decl. Attach. 2 at 236.) On April 10, 2011, Plaintiff
10 sent an inmate communication form to the medical staff at DRCI
11 indicating that his pain medication was no longer sufficient and
12 that he "continue[d] to have exc[r]uciating pain in [his] legs
13 [and] ankles." (Digiulio Decl. Attach. 2 at 360.) Plaintiff was
14 told to sign up for a "sick call," but it does not appear that he
15 did so. (See Digiulio Decl. Attach. 2 at 18, 360.)

16 On May 6, 2011, Plaintiff's hernia surgery was performed by
17 Buzzas and "[t]here were no identifiable complications." (Digiulio
18 Decl. Attach. 2 at 240.) About three months later, on August 12,
19 2011, Plaintiff continued to complain about the ineffectiveness of
20 his pain medication and that his wheelchair had been confiscated.
21 (Digiulio Decl. Attach. 2 at 20.) The medical staff at DRCI took
22 Plaintiff's leg measurements three days later, on August 15, 2011,
23 which showed a one-inch discrepancy between Plaintiff's left and
24 right leg. (Digiulio Decl. Attach. 2 at 20.)

25 On September 9, 2011, Plaintiff sent a kyte to the medical
26 staff asking whether Digiulio had ordered a medical shoe and heel
27 lift for his right leg. (Digiulio Decl. Attach. 2 at 351.)
28 Plaintiff reported that he had been using a cane and performing

1 "some exercise." (Digiulio Decl. Attach. 2 at 351.) Four days
2 later, on September 13, 2011, Plaintiff sent a kyte to the medical
3 staff asking to cancel the weekly weight sessions ordered by his
4 physician because he had only lost three pounds and because he
5 thought he might slip and fall once it became icy outside.
6 (Digiulio Decl. Attach. 2 at 350.) Plaintiff was informed that he
7 would have to sign a refusal of treatment in order to cancel his
8 workout sessions. (Digiulio Decl. Attach. 2 at 350.)

9 On February 15 and February 27, 2012, Plaintiff reported
10 chronic pain in his legs that was exacerbated by the winter
11 conditions. (Digiulio Decl. Attach. 2 at 23.) Plaintiff's
12 complaints continued throughout the coming months and were often
13 times accompanied by requests to alter his pain medications.
14 (Digiulio Decl. Attach. 2 at 23-25, 337.) In late May 2012,
15 Plaintiff received orthotics and a leg brace from Digiulio.
16 (Digiulio Decl. Attach. 2 at 25, 334.) The medical records also
17 continued to reflect that a wheelchair was not medically necessary.
18 (Digiulio Decl. Attach. 2 at 27.)

19 On June 5, 2012, Plaintiff reported that his leg "brace d[id]
20 not fit in [his] tennis shoe" and, at sometime prior to July 9,
21 2012, an order was placed for medical shoes that would accommodate
22 Plaintiff's brace. (Digiulio Decl. Attach. 2 at 26-27.) On June
23 16, 2012, Plaintiff sent a kyte to medical staff requesting that
24 his wheelchair be returned because he continued to have increased
25 leg pain. (Digiulio Decl. Attach. 2 at 332.) On June 27, 2012, a
26 registered nurse informed Plaintiff that Tramadol was strongest
27 medication Digiulio was willing prescribe for Plaintiff's chronic
28 pain. (See Digiulio Decl Attach. 2 at 330.) Two days later, on

1 June 29, 2012, Plaintiff was provided with the names of the
2 physicians on the Therapeutic Level of Care ("TLC") Committee
3 (Digiulio et al.), per his request. (Digiulio Decl. Attach. 2 at
4 329.)

5 On July 1, 2012, Plaintiff requested that his wheelchair be
6 returned because his was having increased pain and swelling in his
7 legs. (Digiulio Decl. Attach. 2 at 328.) Plaintiff was informed
8 that needed to sign up for a sick call if he was experiencing
9 worsening symptoms. (Digiulio Decl. Attach. 2 at 328.) Four days
10 later, on July 5, 2012, Plaintiff filed this § 1983 action against
11 Defendants and the superintendent at the DRCI, Joe DeCamp
12 ("DeCamp"), alleging three Eighth Amendment claims based on
13 inadequate prison medical treatment. (Compl. at 4-7; Order Proceed
14 IFP & Dismiss at 2-3.) On July 30, 2012, Digiulio made entry in
15 Plaintiff's progress notes stating that he would not authorize the
16 use of a wheelchair at that time. (Digiulio Decl. Attach. 2 at
17 28.)

18 On August 1, 2012, Plaintiff reported continuing pain despite
19 the fact that he had been wearing his leg brace as directed.
20 (Digiulio Decl. Attach. 2 at 28.) Plaintiff therefore requested "a
21 better pain med[ication] than the tram[o]dol." (Digiulio Decl.
22 Attach. 2 at 28.) An August 1, 2012 progress note indicates that
23 Digiulio was consulted and said Plaintiff should continue his
24 current treatment plan. (Digiulio Decl. Attach. 2 at 29.) On
25 August 8, 2012, a registered nurse sent Plaintiff an Inmate
26 Communication Response, stating:

27 The provider has been consulted. Ultram has been
28 prescribed for your pain management in addition to other
medications. If you feel Ultram is ineffective, please

1 let us know so we can remove it from the plan of care.
2 You are encouraged to continue lifestyle modifications
3 and practice comfort measures to help your medications
4 have maximal effect. If you need advice on lifestyle
modifications and comfort measures, we will be glad to
assist you.

5 (Digiulio Decl. Attach. 2 at 324.)

6 On August 15, 2012, Plaintiff requested the return of his
7 wheelchair and reiterated that his pain medication was adequate at
8 the other facilities—namely, the facilities that prescribed
9 Plaintiff methadone and/or morphine. (Digiulio Decl. Attach. 2 at
10 30-31.) That same day, a registered nurse advised Plaintiff that
11 he needed to consistently take Ultram in the prescribed dosage
12 (i.e., three time per day instead of once per day as Plaintiff had
13 done “for the most part”) since he continued to complain of pain.
14 (Digiulio Decl. Attach. 2 at 323.) Plaintiff was also informed
15 that a wheelchair was not authorized at that time. (Digiulio Decl.
16 Attach. 2 at 30.) On August 31, 2012, after Judge Anna Brown
17 issued an initial screening order, Plaintiff filed an amended
18 complaint in this proceeding. Plaintiff’s complaints of chronic
19 pain and inadequate pain medication continued unabated thereafter.
20 (Digiulio Decl. Attach. 2 at 30-36.)

21 In September 2012, Plaintiff requested morphine and methadone
22 but was informed by Digiulio during a consultation that he would
23 not be resuming narcotic pain medications. (Digiulio Decl. Attach.
24 2 at 30-31.) On October 2, 2012, Plaintiff completed an Inmate
25 Communication Form indicating that he was interested in Digiulio’s
26 offer to potentially set up physical therapy appointments so
27 Plaintiff could strengthen his legs and pelvis. (Digiulio Decl.
28 Attach. 2 at 319.) Two days later, a registered nurse sent

1 Plaintiff a pamphlet of lower back exercises and instructions,
2 which had been reviewed and approved by a provider. (Digiulio
3 Decl. Attach. 2 at 304, 307.) Nearly two weeks later, on October
4 15, 2012, Judge Anna Brown issued a second screening order
5 dismissing DeCamp as a named defendant as well as two of
6 Plaintiff's Eight Amendment claims, pursuant to 28 U.S.C. §§ 1915A
7 and 1915(e)(2).⁶ (Order at 2, 5, "Plaintiff's amended complaint
8 shall proceed on plaintiff's first claim for relief only, against
9 defendants Degulio and Cazier [based on the confiscation of his
10 wheelchair].")

11 On November 5, 2012, the medical staff at DRCI educated
12 Plaintiff on the importance of physical exercise (e.g., walking and
13 stretching) while staying within his physical limits. (Digiulio
14 Decl. Attach. 2 at 33.) In mid- to late November 2012, Plaintiff
15 experienced pain and swelling in his lower leg and foot due to an
16 ingrown toenail. (Digiulio Decl. Attach. 2 at 33-34, 302.) Around
17 the same time, based on continued complaints regarding Digiulio's
18 decision to only prescribe non-narcotic pain medications, Plaintiff
19 was informed that "medications are prescribed based on professional
20 judgment at the discretion of the provider," and that "the provider
21 specifically [stated in Plaintiff's chart] that [he was] to
22 continue with [his] current treatment plan." (Digiulio Decl.
23 Attach. 2 at 301, 303.)

24 On December 5, 2012, Plaintiff complained of bilateral lower
25 leg pain and pain on the left side of his pelvis, which was

27 ⁶ Plaintiff's second claim for relief was the only cause of
28 action that specifically concerned the alleged denial of adequate
pain medications.

1 exacerbated by the winter conditions, and once again requested a
2 stronger pain medication. (Digiulio Decl. Attach. 2 at 35.)
3 Although the nurse observed that Plaintiff moved in a "slow" and
4 "painful" manner, she noted that "the provider ha[d] made several
5 written orders stating that the patient will not be given narcotics
6 and that he is to continue with the prescribed medical regime."
7 (Digiulio Decl. Attach. 2 at 35.) On December 17, 2012, a nurse
8 completed a progress note indicating that Plaintiff was given the
9 opportunity to seek a second opinion regarding the adequacy of the
10 pain treatment he had been offered that fall, and that Plaintiff
11 declined to do so based on the assumption that physicians employed
12 by the Oregon Department of Corrections ("ODOC") would not disagree
13 with one of their own colleagues. (Digiulio Decl. Attach. 2 at
14 36.) On December 21, 2012, Digiulio made an entry in Plaintiff's
15 progress notes stating that narcotic pain medications were not
16 medically indicated and that Plaintiff was to continue focusing on
17 improving his functionality, range of motion, and activities of
18 daily living. (Digiulio Decl. Attach. 2 at 37.)

19 On January 11, 2013, Plaintiff requested an increased dosage
20 of pain medication (Tramadol) because the "cold weather [wa]s
21 making [his] pelvis and knee hurt more." (Digiulio Decl. Attach.
22 2 at 37.) A medication order was placed that same day. (Digiulio
23 Decl. Attach. 2 at 37.) On January 23, 2013, Plaintiff asked to
24 take his Tramadol dosage in the morning because taking it in the
25 evening disrupted his sleep. (Digiulio Decl. Attach. 2 at 37-38.)
26 Plaintiff reported that he was able to sleep normally when he
27 elected to skip his Tramadol dosage in the evenings. (Digiulio
28 Decl. Attach. 2 at 38.) Plaintiff's request was approved that same

1 day and it appears that he began taking Tramadol at or before noon
2 each day. (Digiulio Decl. Attach. 2 at 38.)

3 On February 13, 2013, Plaintiff complained of pain in his left
4 hip and inquired about a heel lift. (Digiulio Decl. Attach. 2 at
5 38.) On February 25, 2013, the medical staff informed Plaintiff
6 that he was being scheduled for an orthopedic consultation, and
7 that his provider declined to make any changes to his pain
8 medications at that time. (Digiulio Decl. Attach. 2 at 39, 294.)
9 A little over two weeks later, on March 14, 2013, Plaintiff was
10 seen by Adam Short ("Short"), a certified physician's assistant at
11 Desert Orthopedics in Bend, Oregon. (Digiulio Decl. Attach. 2 at
12 39, 248.) Short's treatment notes state, among other things:

13 I did provide [the patient] with a heel lift today. I did
14 recommend the [continued] use of an [Ankle Foot Orthosis]
15 brace on the left leg as much as possible to help with
16 his gait. I also recommended physical therapy working on
soft tissue stretching techniques. Regarding his hip
posttraumatic arthritis, at some point, he may benefit
from an intra-articular injection.

17 (Digiulio Decl. Attach. 2 at 250.) Plaintiff picked up the heel
18 lift and insoles from the medical staff at DRCI the following day.
19 (Digiulio Decl. Attach. 2 at 40.)

20 On April 29, 2013, the parties consented to the exercise of
21 jurisdiction by a magistrate judge in this proceeding. A little
22 over a week later, on May 8, 2013, Plaintiff reported increased
23 pain in his left hip when walking laps at DRCI, and that Tramadol
24 was only effective for one to two hours. (Digiulio Decl. Attach.
25 2 at 41.) Plaintiff was told to continue his medications as
26 directed and educated on the importance of performing exercises
27 that would improve his strength and range of motion. (Digiulio
28 Decl. Attach. 2 at 41.)

1 Plaintiff's problems persisted thereafter, and in mid-June
2 2013, Plaintiff informed the medical staff that "[t]he only thing
3 that works is methadone." (Digiulio Decl. Attach. 2 at 42.) Also
4 in mid-June 2013, the TLC committee approved Plaintiff's use of
5 Baclofen for managing his chronic pain. (Digiulio Decl. Attach. 2
6 at 42, 250-51.) About a month later, on July 16, 2013, Plaintiff
7 reported that he "really noticed difficulty [that day] without
8 Baclofen." (Digiulio Decl. Attach. 2 at 43.) By early September
9 2013, however, Plaintiff began experiencing swelling in his right
10 foot and requested the return of his wheelchair, an extra pillow
11 and an increase in pain medication. (Digiulio Decl. Attach. 2 at
12 46.) Around the same time, Digiulio was consulted and declined to
13 alter Plaintiff's pain medications. (Digiulio Decl. Attach. 2 at
14 281.)

15 Plaintiff had an x-ray taken of his right foot the following
16 day, September 5, 2013, which showed signs of arthritis. (Digiulio
17 Decl. Attach. 2 at 47.) During follow-up visits in late September
18 2013, Plaintiff complained of continued pain and swelling in his
19 right leg and the inadequacy of his pain medications, and he once
20 again reiterated that morphine and methadone had "worked" in the
21 past. (Digiulio Decl. Attach. 2 at 48.) Plaintiff was told to
22 continue taking the medications prescribed and he was educated on
23 the benefits of walking and consuming an adequate amount of
24 protein. (Digiulio Decl. Attach. 2 at 48.)

25 Plaintiff was ultimately released from DRCI on transitional
26 leave on November 19, 2013, and provided with a month's supply of
27 Lipitor, Elavil, Amlodipine, Tamsulosin, Baclofen, and Tramadol.
28 (Digiulio Decl. ¶ 3, Attach. 2 at 261.) On December 10, 2013,

1 Defendants filed their motion for summary judgment, and the Clerk
2 of Court mailed Plaintiff a summary judgment advice notice and
3 scheduling order three days later, on December 13, 2010. Over a
4 month later, on January 21, 2014, the Court granted Plaintiff's
5 motion to extend the deadline in which to file a response brief to
6 March 17, 2014. The motion is now fully briefed.

7 **II. LEGAL STANDARD**

8 Summary judgment is appropriate "if pleadings, the discovery
9 and disclosure materials on file, and any affidavits show that
10 there is no genuine issue as to any material fact and that the
11 movant is entitled to judgment as a matter of law." FED. R. CIV.
12 P. 56(c). Summary judgment is not proper if factual issues exist
13 for trial. *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir.
14 1995).

15 The moving party has the burden of establishing the absence of
16 a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477
17 U.S. 317, 323 (1986). If the moving party shows the absence of a
18 genuine issue of material fact, the nonmoving party must go beyond
19 the pleadings and identify facts which show a genuine issue for
20 trial. *Id.* at 324. A nonmoving party cannot defeat summary
21 judgment by relying on the allegations in the complaint, or with
22 unsupported conjecture or conclusory statements. *Hernandez v.*
23 *Spacelabs Med., Inc.*, 343 F.3d 1107, 1112 (9th Cir. 2003). Thus,
24 summary judgment should be entered against "a party who fails to
25 make a showing sufficient to establish the existence of an element
26 essential to that party's case, and on which that party will bear
27 the burden of proof at trial." *Celotex*, 477 U.S. at 322.

1 The court must view the evidence in the light most favorable
2 to the nonmoving party. *Bell v. Cameron Meadows Land Co.*, 669 F.2d
3 1278, 1284 (9th Cir. 1982). All reasonable doubt as to the
4 existence of a genuine issue of fact should be resolved against the
5 moving party. *Hector v. Wiens*, 533 F.2d 429, 432 (9th Cir. 1976).
6 Where different ultimate inferences may be drawn, summary judgment
7 is inappropriate. *Sankovick v. Life Ins. Co. of N. Am.*, 638 F.2d
8 136, 140 (9th Cir. 1981). However, deference to the nonmoving
9 party has limits. The nonmoving party must set forth "specific
10 facts showing a genuine issue for trial." FED. R. CIV. P. 56(e).
11 The "mere existence of a scintilla of evidence in support of
12 plaintiff's positions [is] insufficient." *Anderson v. Liberty*
13 *Lobby, Inc.*, 477 U.S. 242, 252 (1986). Therefore, where "the
14 record taken as a whole could not lead a rational trier of fact to
15 find for the nonmoving party, there is no genuine issue for trial."
16 *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S.
17 574, 587 (1986) (internal quotation marks omitted).

18 III. DISCUSSION

19 As previously stated, Plaintiff's § 1983 claim alleges a
20 violation of the Eighth Amendment arising from allegedly inadequate
21 medical treatment, on a theory of deliberate indifference to
22 serious medical needs. (Am. Compl. at 4.) Defendants contend that
23 they are entitled to summary judgment "because the undisputed facts
24 demonstrate that while [Plaintiff's] wheelchair was indeed
25 discontinued, the discontinuation was ordered for medically sound
26 reasons for the benefit of the Plaintiff and certainly not out of
27 deliberate indifference to his pain or other serious medical
28 needs." (Defs.' Mot. at 1.)

1 "In the Ninth Circuit, the test for deliberate indifference
2 [to medical need] consists of two p[rong]s." *Jett v. Penner*, 439
3 F.3d 1091, 1096 (9th Cir. 2006). "First, the plaintiff must show
4 a serious medical need by demonstrating that failure to treat a
5 prisoner's condition could result in further significant injury or
6 the unnecessary and wanton infliction of pain. Second, the
7 plaintiff must show the defendant's response to the need was
8 deliberately indifferent." *Wilhelm v. Rotman*, 680 F.3d 1113, 1122
9 (9th Cir. 2012) (citation omitted); *Crowley v. Bannister*, 734 F.3d
10 967, 978 (9th Cir. 2013) ("A prison official violates the Eighth
11 Amendment when he acts with 'deliberate indifference' to the
12 serious medical needs of an inmate.").

13 "Examples of conditions that are 'serious' in nature include
14 'an injury that a reasonable doctor or patient would find important
15 and worthy of comment or treatment; the presence of a medical
16 condition that significantly affects an individual's daily
17 activities; or the existence of chronic and substantial pain.'" *Green v. Bannister*, NO. 3:12-CV-00004-LRH, 2014 WL 281293, at *6
18 (D. Nev. Jan. 23, 2014) (citation omitted). The second prong, on
19 the other hand, requires showing (1) "a purposeful act or failure
20 to respond to a prisoner's pain or possible medical need," and (2)
21 "harm caused by the indifference." *Wilhelm*, 680 F.3d at 1122.
22 "Indifference 'may appear when prison officials deny, delay or
23 intentionally interfere with medical treatment, or it may be shown
24 by the way in which prison officials provide medical care."
25 *Crowley*, 734 F.3d at 978 (citation omitted).

27 Here, it should be noted at the outset that, on two occasions,
28 Cazier's declaration erroneously refers to the year Plaintiff's

1 wheelchair was confiscated as 2012 instead of 2010. (Cazier Decl.
2 ¶¶ 10, 12.) However, the remaining paragraphs in Cazier's
3 declaration, the abundance of progress notes maintained by the
4 ODOC, and the allegations set forth in Plaintiff's amended
5 complaint all reveal that these were typographical errors and that
6 Plaintiff's wheelchair was in fact confiscated during mid-October
7 2010.

8 For example, the ODOC's progress notes indicate that the
9 wheelchair was confiscated on October 12, 2010, returned in the
10 early morning hours the next day after Plaintiff was educated on
11 the proper use of the wheelchair, and then confiscated for a second
12 time later in the evening on October 13, 2010, after Cazier
13 "received [an] order to D/C wheelchair [from] Dr. Digiulio."
14 (Digiulio Decl. Attach. 2 at 12.) In addition, the amended
15 complaint Plaintiff filed on August 31, 2012, clearly alleges that
16 "Dr. Degulio [sic] disallowed the plaintiff's use of his wheelchair
17 on October 15, 2010, and therefore [it] was confiscated by Nurse
18 Cazier."⁷ (Am. Compl. at 6.)

19 Plaintiff did not submit his own evidence in opposition to
20 summary judgment, choosing instead to devote a large portion of his
21 brief to presenting rhetorical questions and arguments challenging
22 the veracity of Defendants' statements to the Court.⁸ The problem
23 for Plaintiff is that his rhetorical questions and arguments are
24

25 ⁷ The initial *pro se* complaint filed by Plaintiff on July 5,
26 2012, recites the exact same allegation. (Compl. at 6.)

27 ⁸ Again, the Clerk of Court mailed Plaintiff a summary
28 judgment advice notice on December 13, 2013, and Plaintiff's
response brief was not due until March 17, 2014.

1 contingent upon the Court construing the facts at the summary
2 judgment stage in a manner consistent with the two typographical
3 errors in Cazier's declaration. (See, e.g., Pl.'s Resp. Br. at 3,
4 "How then could [Digiulio] have in fact physically written the
5 Physicians Order on October 13, 2010[,] [w]hen Defendants weren't
6 even notified of the matter of Plaintiff still having his
7 wheelchair until October 13, 2012?") The Court declines to adopt
8 a clearly erroneous date for confiscation of Plaintiff's
9 wheelchair.⁹

10 It should also be noted that Defendants represent to the Court
11 that the ODOC's records fail to disclose whether the wheelchair in
12 question belonged to Plaintiff or the ODOC. As Digiulio stated in
13 his declaration: "[Plaintiff] arrived at DRCI in a wheelchair but
14 ownership is not clear from ODOC records. [Plaintiff] reported to
15 me on September 3, 2010 that he was given the wheelchair at the
16 Intake Center but later reported he had it when he went to county
17 jail." (Digiulio Decl. ¶ 13; see also Cazier Decl. ¶ 14.)
18 According to Defendants' counsel, "[i]n light of the unresolved
19 question about the original ownership of the wheelchair, the
20 Plaintiff should be given the benefit of the doubt. Defendants ex
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23 ⁹ Plaintiff seeks compensatory damages in the amount of \$1,500
24 per day for the "730 days at DRCI," which results in a total of
25 \$1,095,000 in compensatory damages. On the Court's count, 728 days
26 had elapsed between Plaintiff's transfer to DRCI on September 3,
27 2010, and the filing of an amended complaint on August 31, 2012. If
28 the Court were to assume that Plaintiff's wheelchair was not
confiscated until October 2012, it would reduce any potential
damages period by two years. It would also raise concerns about
whether Plaintiff had a good faith basis for allegations made in
the pleadings.

1 rel the Department of Corrections will compensate the Plaintiff for
2 the value of the wheelchair." (Defs.' Mem. Supp. at 11.)

3 Per Judge Brown's second screening order dated October 15,
4 2012, this § 1983 action was to proceed as a single Eighth
5 Amendment claim against Defendants. Nevertheless, the Court agrees
6 that this *pro se* plaintiff should be given the benefit of the doubt
7 and that he should be compensated by the ODOC for the wheelchair,
8 as proposed by Defendants' counsel. In the event the ODOC fails to
9 do so within thirty days of this Opinion and Order, the Court notes
10 that it would consider a motion to set aside a judgment as well as
11 a subsequent motion for leave to file a second amended complaint,
12 *nunc pro tunc*, for conversion of personal property.

13 That said, Plaintiff's remaining Eight Amendment claim
14 involves choices between alternative courses of treatment—namely,
15 a course of treatment that includes the use of a wheelchair and one
16 that does not. In the Eighth Amendment context, "a mere
17 'difference of medical opinion . . . [is] insufficient, as a matter
18 of law, to establish deliberate indifference.'" *Toguchi v. Chung*,
19 391 F.3d 1051, 1058 (9th Cir. 2004) (quoting *Jackson v. McIntosh*,
20 90 F.3d 330, 332 (9th Cir. 1996)). Instead, "to prevail on a claim
21 involving choices between alternative courses of treatment, a
22 prisoner must show that the chosen course of treatment 'was
23 medically unacceptable under the circumstances,' and was chosen 'in
24 conscious disregard of an excessive risk to [the prisoner's]
25 health.'" *Id.*

26 *Allee v. Oregon Dep't of Corrections*, NO. 06-CV-187-JE, 2007
27 WL 2417390 (D. Or. Aug. 21, 2007), is an illustrative example of a
28 case involving choices between alternative courses of treatment.

1 There, a prisoner sought medical attention on several occasions for
2 pain and reduced range motion in his knees. *Id.* at *2. Although
3 the plaintiff was treated with pain medication, anti-inflammatories
4 and physical therapy, *id.*, he claimed that the defendants violated
5 his Eighth Amendment rights by denying him the use of a cane and
6 wheelchair, *id.* at *5. The district court ruled in the defendants'
7 favor and the Ninth Circuit affirmed on appeal, stating: "The
8 district court properly granted summary judgment on Allee's Eighth
9 Amendment claim regarding a knee injury, because Allee failed to
10 controvert defendants' medical evidence showing that Allee's
11 condition might improve with increased walking, and that a
12 wheelchair and cane were not medically necessary." *Allee v. Or.*
13 *Dep't of Corr.*, 315 F. App'x 610, 612 (9th Cir. 2009).

14 Similarly, in this case, Plaintiff has failed to controvert
15 Defendants' medical evidence showing that Plaintiff's condition
16 might improve with increased walking with the assistance of a cane,
17 and that a wheelchair was not medically necessary. Digiulio
18 testified that he recommended a plan of care to discontinue the
19 wheelchair so Plaintiff "could improve his mobility by walking and
20 using a cane." (Digiulio Decl. ¶¶ 12, 14.) What's more,
21 Digiulio's review of clinical literature suggests that non-narcotic
22 measures associated lifestyle changes, such as weight loss, yoga,
23 exercise and stretching (i.e., the type of activities recommended
24 to Plaintiff), can be as effective as narcotic medications in
25 treating chronic pain. (Digiulio Decl. ¶ 23.) Likewise, Short did
26 not recommend a wheelchair when Plaintiff presented for an
27 orthopedic consultation. (See Digiulio Decl. Attach. 2 at 250.)

1 It is also important to note that just five days prior to
2 Plaintiff's September 8, 2010 consultation with Digiulio (i.e.,
3 when the decision was initially made to discontinue Plaintiff's use
4 of a wheelchair), Plaintiff sent an inmate communication form a to
5 a "Dr. Perini," stating: "I have . . . approval for Shutter Creek
6 AIP [p]roviding I get your approval as its [sic] not wheelchair
7 friendly, [and] I can walk on a cane." (Digiulio Decl. Attach. 2
8 at 382.) Plaintiff complained to a nurse at DRCI three months
9 later about wanting "clearance to do stairs" because he wanted to
10 be transferred to the non-wheelchair-accessible Shutter Creek AIP.
11 (Digiulio Decl. Attach. 2 at 14.)

12 To conclude, "[d]eliberate indifference is a high legal
13 standard. A showing of medical malpractice or negligence is
14 insufficient to establish a constitutional deprivation under the
15 Eighth Amendment." *Toguchi*, 391 F.3d at 1060. "Even gross
16 negligence is insufficient to establish deliberate indifference to
17 serious medical needs." *Lemire v. Cal. Dep't of Corr. & Rehab.*,
18 726 F.3d 1062, 1074 (9th Cir. 2013). The record evidence in this
19 case, even when viewed in the light most favorable to Plaintiff,
20 falls short of a showing of medical malpractice or negligence, let
21 alone gross negligence or a "medically unacceptable" course of
22 treatment "chosen in conscious disregard of an excessive risk" to
23 Plaintiff's health. Motion granted.

24 IV. CONCLUSION

25 For the reasons stated, the Court hereby orders as follows:
26 (1) in accordance with Defendants' counsel's representations to the
27 Court, the ODOC shall compensate Plaintiff for the value of the
28 wheelchair within thirty (30) days of this Opinion and Order; and

1 (2) Defendants' motion (Docket No. 49) for summary judgment on
2 Plaintiff's remaining Eight Amendment claim is granted and this
3 action is dismissed with prejudice.

4 IT IS SO ORDERED.

5 Dated this 3rd day of December, 2014.

6 /s/ Dennis J. Hubel

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DENNIS J. HUBEL
8 United States Magistrate Judge
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